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April 23, 2007

Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Ke: Effects of Communications 'lowers on Migratory Birds; WT Docket No. 03-187, FCC 06-164

Dear Federal Communications Commission:

These comments are submitted on behalf of Defenders of Wildlife and the National Audubon Society in response to the Notice of Proposed Rulemaking in the Matter of Effects of Communications Towers on Migratory Birds. 71 Fed. Reg. 67,510 (Nov. 22,2006). The Notice of Proposed Rulemaking ("NPRM") (FCC 06-164) seeks comment on the "extent of any effect of communications towers on migratory birds and whether any such effect warrants regulations specifically designed to protect migratory birds." *Id.*

Defenders of Wildlife ("Defenders") is a national, non-profit membership organization dedicated to the protection of all native wild animals and plants in their natural communities. Defenders has over 500,000 members and supporters throughout the country. Defenders has undertaken various efforts to work with the Federal Communications Commission ("FCC") to reduce mortality caused by communications towers as far back as 1999. For example, Defenders submitted formal comments to the FCC on November 11,2003, commenting on the FCC Notice of Inquiry (NOI) (FCC 03-205) on the Effects of Communications Towers on Migratory Birds as well as comments and report from Land Protection Partners in response to the Avatar report on February 14,2005 (DA 04-3891), in the matter of WT Docket No. 03-187. We request that these comments letters previously submitted into Docket No. 03-187 be incorporated into our response to the current inquiry.

The National Audubon Society, Inc. is a not-for-profit corporation whose mission is to conserve and restore natural ecosystems, focusing on birds, other wildlife, and their habitats for the benefit of humanity and the earth's biological diversity. National Audubon has more than 367,000 members, offices in 23 states, and a presence in all 50 states through more than 450 certified chapters and through its nature centers, sanctuaries, and education and science programs. National Audubon has been working with other groups to increase public awareness of the adverse impact of communications towers on birds and to reduce bird mortality caused by collisions with these towers.

We thank you for the opportunity to comment as well for granting an extension to the comment period in response to the joint January 8th request from Defenders, American Bird Conservancy, CTIA—The Wireless Association, National Association of Tower Erectors and PCIA—the Wireless

Infrastructure Association. The additional time has been beneficial to the conversations that these groups have been having regarding the issue of bird mortality from collisions with communication towers.

Introduction & Summary

The FCC must comply with the National Environmental Policy Act ("NEPA"), Endangered Species Act ("ESA"), and Migratory Bird Treaty Act ("MBTA"). Defenders urges the FCC to adopt regulations to requite analysis of effects of permitting actions on migratory birds and to enforce the MBTA. The FCC must amend its list of exceptions to a categorical exclusion to explicitly include consideration of migratory bird impacts and must further amend its implementing regulations to enable agency review that will ensure actions are properly excluded from NEPA analysis.

The Legal Framework Governing FCC's Obligations

The FCC has requested comment on the legal framework governing its obligations to protect migratory birds and the threshold necessary to demonstrate an environmental problem that would authorize or require the agency to take action. 71 Fed. Reg. 67,510.

The FCC has already correctly "determined that construction of communications towers requires compliance with environmental responsibilities under NEPA and the ESA." 71 Fed. Reg. at 67,511. Therefore, any arguments that these federal obligations do not apply are immaterial. For example, the NPRM notes that some industry commenters argue that neither NEPA nor the ESA authorize FCC action to minimize effects of communications towers on migratory birds because "tower siting and construction are primarily private actions" which do not trigger federal environmental statutes. FCC 06-164 NPRM at para. 19. This suggestion is without merit for **two** reasons. FCC's issuance of "licenses and permits"[1] are federal actions and NEPA expressly applies to "all agencies of the Federal Government," 42 U.S.C. § 4332 (emphasis added) and to actions "potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18.[2] In addition, the ESA applies to "any action," 16 U.S.C. § 1536(a)(2).[3] In addition, the ESA also applies to private actions, as it too prohibits any take of listed species by any person. *See* 16 U.S.C. § 1538.

FCC actions in permitting the placement and construction of communications towers also requires compliance with the MBTA as well as with the migratory bird treaties themselves. The MBTA, 16 U.S.C. §§ 703-711, implements migratory bird treaties that this country entered into with Canada, Mexico, Japan, and the Soviet Union. The Fish and Wildlife Service ("FWS") has identified over 700 species of birds as protected under the MBTA. 50 C.F.R. § 10.13. Under the MBTA, "it shall be unlawful at any time, by any means, or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill … any migratory bird … included in the

[1] FCC 03-205, In the Matter of Effects of Communications Towers on Migratory Birds, WT Docket No. 03-187, at 3 (Aug. 20, 2003).

[2] When it rnacted NEPA, Congress also established the Council on Environmental Quality ("CEQ), an executive body responsible for reviewing "the various programs and activities of the Federal Government in light of the policy set forth in [NEPA]," *Andrus v. Sierra Club*, 442 U.S. 347,358 (1979) (citing 42 U.S.C. § 4344(3)). The CEQ has issued regulations specifying agencies' obligations under NEPA, *see* 40 C.F.R. 1501-1508, that merit "substantial deference." *Andrus*, 442 U.S. at 358.

[3] *See also* 50 C.F.K. § 402.02 ("Action means all **activities** or programs of any land authorized, funded, or carried out, in whole or in part, by Federal agencies … Examples include, but are not limited to … the granting of licenses …").

terms of the conventions ...."[4] "Take" and "migratory bird" are not defined in the MBTA but in the implementing regulations. "Take" is defined as "pursue, hunt, shoot, wound, kill, trap, capture, or collect, or the attempt" to engage in any of the foregoing, while "migratory bird" is defined as "any bird ... which belongs to a species listed in [50 C.F.R.] Sec. 10.13" 50 C.F.R. § 10.12. The Secretary of the Interior may issue regulations and permits allowing take, if in accordance with the governing treaties.'

Each treaty includes protections for non-game birds and the last three of the four include conservation of habitat **also.**[6] The treaty with Canada, for example, specifies migratory game birds by family and migratory insectivorous birds and migratory non-game birds by common name.' The treaty with Russia, on the other hand, broadly defines 'migratory birds' and provides a list in an appendix and calls for the parties to "cooperate to the maximum possible degree in preventing, reducing or eliminating such damage to migratory birds and their environment."'

The FCC's NEPA Obligations Support the Promulgation of Regulations for the Protection **of** *Migratory Birds*

NEPA, 42 U.S.C. § 4321 *et seq.*, **is** "our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). Far from merely announcing abstract principles, Congress "[made] environmental protection a part of the mandate of every federal agency and department." *Calvert Cliffs' Coordinating Committee, Inc. v. Atomic Energy Commission,* 449 F.2d 1109, 1112 (D.C. Cir. 1971). Realizing that NEPA's purposes would be achieved "only with great difficulty," Congress inserted "action-forcing procedures" ***into*** NEPA. *Andrus v. Sierra Club*, 442 U.S. 347, 349-50 (1979) (citations omitted). NEPA requires that "to the fullest extent possible ... all agencies of the Federal Government shall ... include in major Federal actions significantly affecting the quality of the human environment, a detailed statement" addressing "the environmental impact of the proposed action, any adverse environmental impacts which cannot be avoided ... alternatives to the proposed action," and other environmental issues. 42 U.S.C. § 4332.

Through these procedures, federal agencies must take a "hard look at [the] environmental consequences" of their proposed actions. *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 98 (1983) (citations omitted). In so doing, NEPA makes certain "that

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[4] 16 U.S.C. § 703. The MBTA provides for penalties of "not more than $15,000" or imprisonment of "not more than six months, or both" after being found guilty **of** a misdemeanor for violating the MBTA or its regulations. *Id.* § 707.

[5] 16 U.S.C. §§ 704, 712(2). In promulgating regulations, the Secretary of the Interior must consider, *inter alia*, the distribution and abundance of migratory bird species.

[6] Convention between the United States and Great Britain for the Protection of Migratory, Aug. 16, 1916, U.S.-U.K., 39 Stat. 1702. Later treaties include Convention between the United States and Mexico **for** the Protection of Migratory Birds and Game Mammals, Feb. 7, 1936, U.S.-Mex., 50 Stat. 1311; Convention between the Government of the United States of America and the Government of Japan for the Protection of Migratory Birds in Danger **of** Extinction, and their Environment, Mar. 4, 1972, U.S.-Jap., 25 U.S.T. 3329; Convention between the United States of America and the Union of Soviet Socialist Republics Concerning the Conservation **of** Migratory Birds and their Environment, Nov. 19, 1978, U.S.-U.S.S.R., 29 U.S.T. 4647.

[7] Convention between the United States and Great Britain for the Protection **of** Migratory, ***supra*** note 2, Art. 1 Provisions of this treaty are generally similar to that with Mexico.

[8] Convention between the United States of America and the Union of Soviet Socialist Republics Concerning the Conservation of **Migrator).** Birds and their Environment, *supra* note 2, Art. I, IV. Provisions of this treaty are generally similar to that with Japan.

environmental concerns will be integrated into the very process of agency decisionmaking." *Andrus*, 442 U.S. at 350.

A federal agency must prepare an environmental impact statement ("EIS") when it proposes an action that will "significantly affect[] the quality of the human environment." 42 U.S.C. § 4332(C). *See* 40 C.F.R. § 1502.1 ("The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government").

NEPA's procedural requirements serve twin goals. First, "[they] ensure[] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Methow Valley*, 490 U.S. at 349. As the implementing regulations make clear, NEPA "is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." 40 C.F.R. § 1500.1(c).

Second, NEPA "guarantees that the relevant [environmental] information will be made available to the larger audience that may also play a role in both the decisionmalung process and the implementation of that decision." *Methow Valley*, 490 US. at 349. By thoroughly collecting and analyzing this data, federal agencies educate not only themselves, hut also other governmental actors and the public, about the environmental ramifications of their proposed action.

NEPA procedures promote intergovernmental consultation that will identify and avoid conflicts within an agency, among agencies and between branches of government. See 40 C.F.R. § 1502.16(c). Intergovernmental cooperation is essential to allow "other government agencies to react to the effects of a proposed action at a meaningful time." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360,371 (1989). Thus, the CEQ regulations require federal agencies to circulate the EIS to "[a]ny Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved and any appropriate Federal, State or local agency authorized to develop and enforce environmental standards." 40 C.F.R. § 1502.19(a). Indeed, one of the main functions of the EIS preparation process is to solicit input from these expert agencies and to modify the environmental analysis accordingly. *Id.* § 1503; see *also id.* § 1506.1 (limiting agency action before NEPA is complete).

Because NEPA supplements an agency's authority, see *id.* § 1500.6, this cooperation assists the agency's obligation to consider environmental implications. Incorporating environmental values into agency decisionmalung, however, does not come at the cost of other agency considerations. See *Baltimore Gas & Electric Co.*, 462 US. at 91 (citations omitted); *see also* 42 **U.S.C.4335;** *Pacific Legal Foundation v. Andrus*, 657 F.2d 829, **835** (6th Cir. 1981) ("NEPA supplements the existing gods of agencies and provides that agencies should also consider environmental concerns.").

Compliance with NEPA begins with a federal agency's preparation of an Environmental Assessment ("EA") – a document meant to provide "sufficient evidence and analysis for determining whether to prepare an environmental impact statement [("EIS")]." 40 C.F.R. 1508.9(a). The regulations dictate that an EA must include a full and fair discussion "of the need for the proposal, of alternatives as required by [NEPA], of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted." *Id.* § 1508.9(b). Under certain carefully defined circumstances, the EA may lead to a Finding Of No Significant Impact ("FONSI"), a determination that obviates the need to preparr a full EIS. See 40 C.F.R. 1508.13.

A federal agency must prepare an EIS when an EA indicates that a proposed action will "significantly affect[] the quality of the human environment." 42 U.S.C. 4332(C). This critical

document must contain a detailed discussion of the "effects" of the agency's action. These include both "direct effects," that are "caused by the action and occur at the same time and place," and also "indirect effects," that are "later in time or farther removed in distance, hut are still reasonably foreseeable." 40 C.F.R. 1508.8(a), (b). The defmition of "effects" also includes "cumulative effects," *id.* at § 1508.25(c), which the regulations define as the "incremental impact of the action when added to other past, present, and reasonably foreseeable future actions *regardless of what agency (Federal or non-Federal) or person undertakes such* **other** *actions.*" *Id.* § 1508.7 (emphasis added),

A Significant Effect on the Environment in the Context of Migratory Birds

A federal agency must prepare an EIS when an EA indicates that a proposed action will "significantly affect[] the quality of the human environment." 42 U.S.C. § 4332(C). In evaluating the significance of an action, agencies must analyze local, as well as national, impacts and must also consider "both short- and long-term effects." 40 C.F.R. § 1508.27. This discussion must address "appropriate mitigation measures" that the agency could take to reduce the adverse environmental effects of its proposed action. *Id.* § 1502.14(f).

Significance is measured by the context and intensity of the action. *Id.* § 1508.27. Context means that the action and its impacts must be considered in several contexts: national; regional; and local. *Id.* § 1508.27(a). Intensity refers to the severity of the environmental and includes consideration of the degree to which the action affects unique wetlands, ecologically critical areas, historic and cultural resources, or threatened or endangered species; the degree to which these impacts may be controversial, unique, uncertain, or unknown; whether the action is related to other actions with a cumulatively significant impact; and whether the action violates federal law or other requirements for environmental protection. ***See*** *id.* § 1508.27(b).

Because, as shown below, federal agencies are subject to the MBTA's prohibitions on take, any FCC action that may take migratory birds is a violation of federal law. There **is** abundant evidence already submitted to the FCC, in response to the 2003 Notice of Inquiry and 2004 Avatar report, demonstrating the number of migratory birds killed by communications towers licensed and permitted by the FCC. Violations of federal law and other requirements imposed for the protection of the environment are significant environmental effects that necessitate preparation of an EIS.

We also note that the FCC NPRM inquiry into other sources of avian mortality is not relevant to this inquiry. ***See*** 71 Fed. Reg. at 67,511. It is the killing of migratory birds at towers under the jurisdiction of the FCC that requires the FCC to act under NEPA, the MBTA, and the ESA. That birds are **also** killed by other means is not relevant to the significance of the environmental effects or to the obligations for the FCC to act under NEPA, MBTA, and the ESA. The scientific documentation of the significance of tower kills on migratory bird populations, particularly of Birds of Management Concern, is more than enough to require action by the FCC to account for and prevent this mortality under NEPA, MBTA, and the ESA.

Also, the FCC cannot requite the public to show that significant effects **will** in fact occur in order to demonstrate that the agency must prepare an EIS. According to NEPA's implementing regulations, the FCC should prepare an EIS for any action that "may" have a significant effect. 40 C.F.R. §1508.3. Accordingly, "[a]n agency's refusal to prepare an [EIS] **is** arbitrary and capricious if its action might have a significant environmental impact." *State of North Carolina. v. FAA*, 957 F.2d 1125, 1131 (4th Cir. 1992) (emphasis added). **See** *also Blue Mtns Biodiversity Project v. Blackwood,* 161 F. **3d** 1208,1212 (9th Cir. 1998) (an EIS must be prepared if there are substantial questions about whether a project may have a significant effect).

The Nature and Scope *of FCC's* Responsibilities under the **MBTA** and ***Migratory*** Bird Treaties

Generally, the MBTA has no scienter requirement; it applies to both intentional and unintentional bird deaths. Furthermore, the type of act that takes migratory birds is also irrelevant; the MBTA is not limited in application to acts of hunting or poaching. Federal courts and the FWS have also recognized that federal agencies are subject to the MBTA. In sum, due to the FCC's long-standing knowledge that its acts **will** result in the illegal taking of migratory birds, its failure to take action to minimize and mitigate for such take, and its duty to comply with the MBTA, FCC is in violation of the MBTA.

For example, in *United States v. Moon Lake Elec. Ass'n. Inc.,* the court held a rural electrical distribution cooperative accountable for killing protected birds by its power poles. 45 F.Supp. 2d 1070 (D. Colo. 1999). The cooperative argued that federal game laws did not apply to unintentional conduct that is not equivalent to hunting and poaching because the plain language of the BGEPA and MBTA, their respective legislative histories, and judicial opinions support the conclusion that they proscribe conduct beyond the sort normally exhibited by hunters and poachers. *Id.* at 1072. With regard to the first defense, the district court did not agree, instead joining other circuits that have held the MBTA to be a suict liability statute and stating, "Simply stated…'it is not necessary to prove that a defendant violated the Migratory Bird Treaty Act with specific intent or guilty knowledge."' *Id.* at 1073 (citing *United States v. Corrow,* 119 F.3d 796, 805 (10th Cir. 1997), *cert. denied* 522 U.S. 1133 (1998) (quoting *United States v. Manning.* 787 F.2d 431, 435 n.4 (8th Cir. 1986)). The court also did not agree that the MBTA applies only to those acts associated with hunting or poaching, relying on plain language and caselaw. *Id.* at 1075 (noting that the MBTA, 16 U.S.C. 5 703, prohibits taking and killing "by any means or in any manner").

l h e Navy in *Ctr. for Biological Diversity v. Pirie* argued that take of migratory birds from training exercises on Farallon de Medinilla was unintentional. 191 F.Supp.2d 161 (D.D.C. 2002). The court rejected the Navy's argument, finding that the take was intentional because of the Navy's knowledge that birds will be killed. *Id* at 174-75.

Applicability **to Federal** Agencies. Section 6 of the MBTA makes "any person, association, partnership, or corporation" who violates the MBTA or its regulations subject to penalties. 16 U.S.C. § 707. Historically, the FWS, along with some courts, had interpreted the MBTA as applicable to the federal government. For example, an early Supreme Court case had assumed that section 2 applied to federal agencies' logging decisions. *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 437-38 (1992). Subsequent cases in **two** circuit courts, though, upheld the federal government's position that the MBTA take prohibition did not apply to federal agencies' decisions involving timber sales.' Plaintiffs in both cases relied on the Administrative Procedure Act in seeking injunctive relief. The D.C. Circuit Court, though, recently held that federal agencies are subject to the MBTA's take prohibitions. *Humane Soc'y v. Glickman*, 217 F.3d 882 (D.C.Cir. 2000) (noting that the take prohibition **is** not hnked to the acts of any ''person'' and even if "person" as defined by MBTA section 6 does not include federal agencies the MBTA could be enforced by means other than section 6 penalties, means such **as** injunction). Because the prohibitions of the MBTA apply to federal agencies, private parties can now seek to enjoin federal actions that take migratory birds,

[9] *See Newton County Wildlife Ass'n v. U.S. Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997) (holding MBTA sanctions apply to persons and the United States is not construed to be a person, unless explicitly made so); *Sierra Club v. Martin*, 110 F.3d 1551,1555 (11th Cir. 1997) (same, and **also** opining that the Forest Service follow NFMA's viability regulations and regulatory process in addressing conservation of migratory birds, not the MBTA). *See also* Memorandum from Acting Director, FWS, to Regional Directors, FWS (April 16,1997).

unless such taking is authorized pursuant to MBTA regulations."[10] It is now the position of the FWS – the federal agency charged with enforcing the MBTA – that federal agencies are subject to the permit requirements of the Service's existing regulations and this position is now reflected in the FWS Manual."

After the *Humane Society* case, President Clinton s p e d an executive order which directs federal agencies to take certain actions to implement the MBTA. *See* E.O. 13186 of Jan. 10,2001: Responsibilities of Federal Agencies to Protect Migratory Birds, 66 Fed. Reg. 3,853 (Jan. 17,2001). Among the actions, each federal agency is to develop a Memorandum of Understanding with the FWS in order to promote the conservation of migratory bird populations and minimize takings of protected birds. *Id.*

Applicability to the FCC. The District of Columbia Circuit Court of Appeals is the same federal court with jurisdiction over matters pertaining to the FCC. Under the Communications Act of 1934, 47 U.S.C. §151 *et seq.*, jurisdiction for appeals of final FCC decisions and actions rests in this same court; the FCC is bound by this court's rulings.

Lastly, the FCC has the same duty as other federal agencies to comply with its obligations under the four migratory bird treaties. This duty was recognized in the *Humane Society* case when the coutt stated, "it would be odd if [federal agencies] were exempt. The Migratory Bird Treaty Act implements the Treaty of 1916. Treaties are undertakings between nations; the terms of a treaty bind the contracting powers.. ....the fact that the Act enforced a treaty between out country and Canada reinforces our conclusion that the broad language of §703 applies to actions of the federal government." And, in fact, this policy of the Department of the Interior is further evidenced by the Migratory Bird Executive Order. See 72 Fed. Reg. at 8,947.

FCC May Promulgate Regulations to Comply with the MBTA

The FWS is the agency responsible for administering the MBTA, but that does not remove the obligation of the FCC to comply with the MBTA. The Secretary of the Interior may issue, and has issued, regulations and permits allowing take, if in accordance with the governing treaties. *See* 16 U.S.C. §§ 704, 712(2).[12] The FCC is subject to the requirements of the MBTA as well as the migratory bird treaties. As such, the FCC has the authority and obligation to consult with the FWS, adopt guidelines and issue regulations in order to minimize and mitigate its effects on migratory bird populations, just as it does to comply with NEPA and ESA obligations.

FCC Should Amend NEPA Regulations to Require Analysis of Effects on Migratory Birds

'lhe FCC requests "comment as to whether to amend section 1.1307(a) of the commission's rules to routinely require environmental processing with respect to migratory birds." 72 Fed. Reg. at 67,515. The FCC must amend section 1.1307 to explicitly require consideration of impacts to migratory

[10] *See Ctr. for Biological Diversity v. Pirie*, 191 F.Supp.2d 161 (D.D.C. 2002) (ruling that Navy activities resulting in takes without a permit were illegal) *and201* F.Supp.2d 113 (D.D.C. 2002) (awarding a preliminary injunction to private citizen's claim brought pursuant to Administrative Procedure Act enjoining activity and ordering Navy to apply for permit).

[11] Division of Migratory Bird Management, *Migratory Bird Permits: Authorities, Objectives, & Responsibilities; Migratory Bird Permits*, 724 F.W. 2, *available at* http://policy.fws.gov/724fw2.pdf (last visited Oct. 13,2006).

[12] In promulgating regulations, the Secretary of the Interior must consider, *inter alia*, the distribution and abundance of migratory bird species. See *also* 50 C.F.R. $21.21 *et seq.*

birds and section 1.1308 to require FCC review and approval of the applicant's determination before the proposed action can proceed.

Almost all towers registered by the FCC are categorically excluded from environmental review by the FCC's NEPA rules. 47 C.F.R. § 1.1306. Categorical exclusions ("CatEx") are categories of actions "which do not individually or cumulatively have a significant effect ..." 40 C.F.R. § 1500.4(p). However, the FCC must provide for "extraordinary circumstances" where an excluded action may have a significant effect. *Id.* § 1508.4. Any action within one of these categories must be subjected to enough environmental review to determine if it meets any of the extraordinary circumstances.

The FCC has exempted almost all tower registrations from NEPA requirements for an EA or EIS unless the action falls into a few narrowly defined categories set forth in the regulations. *See* 47 C.F.R. § 1.1307 *et seq.* These categories include the approval of facilities that are to be located in a designated wilderness area or wildlife preserve; facilities that may affect threatened or endangered species; facilities that may affect cultural or historic resources listed or eligible for listing on the National Register of Historic Places; facilities that are located in a floodplain; facilities "whose construction will involve significant change in surface features;" and facilities that are to be equipped with high intensity light in residential areas. 47 C.F.R. § 1.1307(a); *see also id.* § 1.1307(b). Thus, under FCC regulations, communications tower licensing applicants need only prepare an EA if, and only if, the project falls within one of these narrow categories.

By contrast, NEPA implementing regulations and other NEPA orders define significance much more broadly than the FCC has. For example, in assessing the intensity of the environmental impact, NEPA regulations measure significance by additional factors such as whether the effects are highly controversial, 40 C.F.R. § 1508.27(b)(3), whether the action may establish a precedent for future actions, *id* § 1508.27(b)(6), whether the action will have uncertain, unique or unknown risks, *id* § 1508.27(b)(5), and whether the action may violate federal law or requirements for the protection of the environment, *id.* § 1508.27(b)(10). In addition, executive orders requiring examination of effects on low income or minority populations, E.O. 12898, access to and use of Indian sacred sites, E.O. 13007, and the introduction or spread of non-native species, E.O. 13112, also create extraordinary circumstances which may require an EA or EIS. See *e.g.*, 516 DM 2 in 69 Fed. Reg. 10866 (March 8, 2004). Of great relevance here, and to which the FCC's regulations are totally silent, is the recent executive order directing agencies to minimize and mitigate adverse impacts on migratory birds when carrying out agency actions. E.O. 13186 of Jan. 10,2001: Responsibilities of Federal Agencies to Protect Migratory Birds, 66 Fed. Reg. 3,853 (Jan. 17, 2001).

Under current FCC rules and practice, communications licenses and construction permits that may have potentially significant adverse effects on migratory birds protected under the MBTA are categorically excluded from NEPA review, and hence escape NEPA review. The FCC regulations provide no rationale for this omission, nor can it be reconciled with the CEQ regulations implementing NEPA. The FCC should reexamine its use of a CatEx for tower registrations given the exponential growth in the numbers of towers since the CatEx was adopted over 20 years ago and the lack of support for a finding that tower permitting and construction have individually and cumulative insignificant impacts as well as the overly narrow exceptions to the CatEx. The FCC must in any event amend its NEPA implementing regulations at section 1.1307(a) to include an additional extraordinary circumstance for facilities that may affect migratory bird resources, thus requiring additional analysis by the FCC. These duties arise from the FCC's obligations under NEPA, MBTA, and E.O. 13186.

No Support for Conclusion that Actions Do Not Have Cumulative Insignificant Environmental Effects. NEPA implementing regulations allow agencies to establish categorical exclusions only for "actions which do not individually or cumulatively have a significant effect on the human environment." 40 C.F.R. § 1508.4. Defenders' previous comment letters and other submissions incorporated by reference, including those submitted by the FWS, include ample data documenting the significant effect on the human environment posed by FCC actions in terms of migratory bird mortality and other adverse effects. As the FWS has found several years ago, communications towers kill between 4 and 5 million birds every year. Service Guidance on the Siting, Construction, Operation and Decommissioning of Communications Towers (Sept. 14, 2000), available at http://www.fws.gov/habitatconservation/com_tow_guidelines.pdf. This includes endangered species and more than 60 species of Birds of Conservation Concern listed by the FWS. The lack of support for a categorical exclusion – because there is a individually and cumulatively significant impact – calls for amendment of FC implementing regulations.

Extraordinary Circumstances Presented by Migratory Birds. The FCC admits that "under our present rules we do not routinely require environmental processing with respect to migratory birds." *See* 61 Fed. Reg. at 67,511. The FCC has known for quite some time that its rules may not protect migratory birds," yet there exists simple and widely available measures from the FWS for the minimization and mitigation of adverse effects to migratory birds in the Service Guidance.

Because the FCC's current rules provide only the opportunity but not the guarantee that it will account for adverse effects to migratory birds when making permitting and licensing decisions, its current rules are insufficient. See FCC 06-164 NPRM at para. **33** (citing *two* proceedings in which the FCC did consider the impact of proposed actions on migratory birds). Any reliance on these anomalies is misplaced because of the tens of thousands of towers in the United States, the FCC can cite to only hvo where the agency considered migratory bird impacts – and that consideration resulted from challenges by concerned third parties, not by the agency.

As detailed elsewhere in this letter, both the FCC as a federal agency and the applicant as a private party are subject to the obligations and prohibitions of the MBTA. Federal or private actions that take migratory birds violate the MBTA and as a violation of federal law are significant environmental effects under NEPA. See 40 C.F.R. § 1508.27(b)(10). Furthermore, federal agencies are under executive order to conserve migratory birds and to minimize adverse impacts to migratory birds. The requirements of the MBTA and executive order, read in conjunction with NEPA, call for the FCC to add to section 1.1307 the consideration of adverse effects to migratory birds to its list of extraordinary circumstances that require NEPA analysis in an **EA** or EIS. The FCC should also incorporate the Service Guidance on the Siting, Construction, Operation and Decommissioning of Communications Towers into section 1.1307.

Environmental Review for Extraordinary Circumstances. Current FCC procedures do not ensure sufficient environmental review to ensure that an action is not wrongfully excluded from NEPA review. The FCC delegates its NEPA responsibilities to the applicant, who decides whether a particular project falls within one of the few narrow exceptions to the FCC's blanket NEPA exclusion. 47 C.F.R. $1.1308. As the FCC admits:

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[3] For example, Holly Berland, a staff attorney with the FCC's Office of General Counsel, noted in her August 1999 presentation at the Avian Mortality at Communication Towers Workshop at Cornell University "our environmental rules today do not require the routine consideration and assessment of towers' impact on migratory bird populations." See http://www.towerkill.com/workshop/proceedings/html/pan10.html.

Thus, the Commission's environmental rules require licensees. license applicants, and others subject to those provisions to evaluate, prior to construction, whether a proposed tower within one of the specified categories of facilities may have significant environmental impact. In those instances where a site-by-site license, construction permit, or antenna structure registration is required for the facility, the entity must certify compliance with the environmental rules on the appropriate application form. If an EA is not required. the party mav proceed with the project without providing any environmental documentation to the Commission. However, if there would be a potential environmental impact, an E A must be submitted with the application for the Commission to determine if the action would have a significant impact on the environment.

FCC-06-164 NPRM at para. 11 (footnotes omitted) (emphasis added). A guidance form for some of the application forms referred to above expands on this flawed process:

If, after consulting the NEPA rules, a wireless service provider determines that its proposed service facility project does not fall under any of the listed categories in section 1.1307, section 1.1306 states that the licensee may proceed with the project without providing any documentation to the Bureau. Both FCC Form 601 (Application for Radio Service Authorization) and FCC Form 854 (Application for Antenna Structure Registration) contain question 28, which asks whether the licensee'sproposed action may have a significant environmental effect requiring an EA. If the licensee indicates "NO" tu this question. no environmental documentation is reauired to be filed with the Commission. However, the licensee should maintain all pertinent records and be ready to provide documentation supporting its determination that an EA was not required for the site, in the event that such information is requested by the Bureau pursuant to section 1.1307(d).

FCC, Compliance with Commission's Rules Implementing the National Environmental Policy Act of 1969, *available ut* http://www.fcc.gov/wtb/siting/npaguid.html (emphasis added).

Currently, applicants are not required to submit any data or documentation to validate their claim that no E 4 is required, and there is no requirement for the FCC independently to review the applicant's assertion. This procedure plainly violates the law. *See State of Idaho, et al. v. ICC*, 35 F.3d 585, 595-96 (D.C. Cir. 1994) (noting that an agency's "attempt to rely entirely on the environmental judgments of other agencies" and of the regulated entities was a "blatant departure from NEPA").

Moreover, when an applicant does prepare an EA, the FCC's regulations do not require that it "provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact," as well as "brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), [and] of the environmental impacts of the proposed action and alternatives." 40 C.F.R. $1508.9. *Compare* 47 C.F.R. § 1.1311. The FCC's only role is to review the final EA and to issue either a Finding of No Significant Impact ("FONSI") or a determination that an EIS is necessary. ***Id.*** § 1.1308. Unfortunately, the FCC's FONSI is in most cases is a conclusory assertion of "no impact" rather than an explanation of how the action will not have a significant impact. See *id.* § 1508.13.

The FCC cannot cure the defects in its categorical exclusion checklist by simply adding items to a checklist that the FCC does not independently review for accuracy as to environmental impacts, and specifically, impacts to migratory birds. The FCC must correct its procedural requirements of section 1.1308 to ensure NEPA compliance for each tower-related action based on its own review and evaluation. The practice of automatically registering each new tower where no item in the section 1.1307 checklist is checked affirmatively must end. The FCC must conduct its own independent analysis, relying on comments from the FWS and the applicant's use of avoidance measures, to determine if the statutory requirements of the MBTA, ESA, and NEPA are met.

Recommendations Regarding Tower Siting, Construction and Design:

In addition to the legal recommendations outlined above, we have the following recommendations regarding tower lighting, construction and design.

A recent well-designed study comparing collision rates at communication towers equipped with different types of FAA obstruction lighting in order to determine what conditions are more likely to result in bird mortality was conducted by Joelle Gehring of the Michigan Natural Features Inventory and Paul Kerling of Curry and Kerlinger, LLC. We understand that their study will be submitted as part of this comment period and therefore we will only highlight the major findings, which we believe provide a sound scientific basis for several of our recommendations.

The most important result of their study found that flashing beacons (L-864 or L-865) were involved in significantly fewer avian fatalities than towers lit with a combination of L-864 red, strobe-like beacons and steady burning L-810 lights. The researchers believe their results "demonstrate that avian fatalities can be reduced dramatically at guyed communication towers, perhaps by 50-70%, by removing the steady burning L-810 lights." In the discussion section of their report, the authors state "By simply removing the L-810 lights from all communication towers, it is possible that more than one to two plus million bird collision with communication towers might be averted each year, assuming that about four million birds per year collide with communication towers (estimate from USFWS 2000). Because guyed towers (or guy wires of those towers) now standing are not likely to be removed from the landscape, changing FAA obstruction lighting provides virtually the only means of reducing fatalities at existing towers." Given that this statement reflects the FWS' lower estimate of annual bird mortality from collisions with communication towers, the number of bird deaths that could be avoided by extinguishing L-810s could be far greater. Therefore we strongly recommend that the FCC work with the FAA to revise relevant circulars to allow for extinguishing of l-810s. We further recommend that when allowed by the FAA, that the FCC facilitate the process by which tower companies can extinguish such lighting as quickly as possible.

In the same analysis, the researchers also looked at the role of tower height and guy wires and their relative risks to birds. They found that unguyed towers 116-146 meters above ground level (AGL) experienced significantly fewer fatalities than towers of the same height that were guyed. The authors state "Our results show that bird fatalities may be reduced by 69% to nearly 100% by constructing unguyed towers instead of guyed towers, and 54%-86% by constructing guyed towers 116-146 m AGL instead of guyed towers >305 m AGL."

This study and others have documented that guy wires present a significant threat to birds. To minimize the risk that guyed towers pose, new towers should be constructed without guy wires if at all possible, We propose that for any new antenna tower the applicant should not use guy wires unless certification is submitted by a qualified engineer that the structure cannot practicably be built as a monopole or of lattice design. In considering practicability, the applicant must demonstrate that guy wires arc necessary because the tower cannot be built without guy wires because of safety concerns, significantly higher costs, or due to other engineering factors that require use of guy wires.

Because of the impact of towers on birds, we believe tower construction should be minimized as much as possible. One way this can be achieved is through co-location. We recommend that an applicant for an antenna tower should be required to submit a written declaration to the FCC demonstrating why they have no viable opportunity for co-location of an antenna. And because

lighted towers pose more of a risk than unlighted towers, we further recommend that applicants build towers under 200 feet in order to avoid FAA lighting requirements.

Thank you for the opportunity to comment.

Sincerely,

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Defenders of Wildlife

Caroline Kennedy
Senior Director of Field Conservation
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Gregory S. Butcher, Ph.D
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April 20,2007

Kevin Martin
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Federal Communications Commission
45 12th Street, SW
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Re: Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992 (MB Docket No. 05-311; FCC 06-180)

Chairman Martin:

In response to the Further Notice of Proposed Rulemaking for the Implementation of Section 621(a)(1) of the Cable Communications Policy Act (MB Docket No. 05-311; FCC 06-180), the National Conference of State Legislatures (NCSL) respectfully submits its comments on the Further Notice of Proposed Rulemaking and their impact upon the states.

The Communications Act of 1934, as amended, governs the authority of the Federal Communications Commission's (FCC) authority to preempt state regulation of video franchise authority. Section 632 of the Communications Act of 1934 (47 U.S.C. 552(d)(2)) states that:

> "[n]othing in this Section shall be construed to preclude a franchising authority and a cable operator from agreeing to customer service requirements that exceed the standards established by the Commission .... Nothing in this Title shall be construed to prevent the establishment and enforcement of... any State law, concerning customer service that imposes customer service requirements that exceed the standards set by the Commission under this section, or that addresses matters not addressed by the standards set by the Commission under this section."

The Communications Act of 1934 is unambiguous and explicit in its prohibition of preemption of customer service requirements and standards that exceed those established by the FCC. In addition, the FCC correctly concluded in its Report and Order and Further Notice of Proposed Rulemaking for the Implementation of Section 621(a)(1) of the Cable Communications Policy Act (MB Docket No. 05-311; FCC 06-180) that it does not have the authority to preempt state customer service requirements and standards.

NCSL urges the FCC to affirm its tentative conclusion in the Notice of Proposed Rulemaking on the Order (MB Docket No. 05-311; FCC 06-180) that states may "exceed the Commission's standards," and find that the FCC is, in fact, prohibited from preempting state customer service standards that exceed those established by the FCC. The ability of states to craft solutions that go above-and-beyond those established by the FCC and that are unique to its respective jurisdiction

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is a fundamental principle underlining our federal system of government and necessary to protect our citizenry from the challenges that are unique to each state.

NCSL appreciates your consideration on this issue and looks forward to working with you and the FCC in the future.

Sincerely,

Assemblyman Upendra Chivukula, New Jersey
Chair, NCSL Committee on Communications,
Financial Services & Interstate Commerce